EXPLANATORY MEMORANDUM TO

THE COMPULSORY ELECTRONIC MONITORING LICENCE CONDITION ORDER 2021

2021 No. 330

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument requires an electronic monitoring condition to be included on the licence of a person released on licence who meets the criteria set out in the instrument.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is the first exercise of the power to compulsorily impose an electronic monitoring condition under section 62A of the Criminal Justice and Court Services Act 2000.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 Section 62 of the Criminal Justice and Court Services Act 2000 ("the 2000 Act") provides that the Secretary of State may include an electronic monitoring condition on the licence of any person released from prison. An electronic monitoring condition is a condition requiring the person to submit to either or both of: (i) electronic monitoring of the person's compliance with another condition of release; (ii) electronic monitoring of the person's whereabouts (other than for the purpose of monitoring compliance with another condition of release). The power under

section 62 is exercised on a discretionary basis and will only be included on the licence of an offender if it is considered necessary and proportionate to manage their individual risk on release.

6.2 Section 62A of the 2000 Act confers a power on the Secretary of State to make an order which provides that an electronic monitoring condition must be included on the licence of all those persons released from prison who meet the description set out in the order. Such an order may: (i) require an electronic monitoring condition to be included for so long as the person's release is required to be, or may be, subject to conditions or for a shorter period; (ii) make provision generally or in relation to a case described in the order; (iii) make provision in relation to persons selected on the basis of criteria specified in the order or on a sampling basis; and (iv) make provision by reference to whether a person specified in the order is satisfied of a matter. In addition, section 76(3) of the 2000 Act provides that such an order may make different provisions for different purposes or different areas.

6.3 This instrument exercises the power in section 62A of the 2000 Act, requiring the compulsory inclusion of an electronic monitoring condition on the licence of a 'qualifying offender' for the 'specified period'.

6.4 A qualifying offender is a person who meets all of the following criteria as described in Article 2:

- a fixed-term prisoner released on licence on or after commencement (12 April 2021), meaning those already in the community on licence on commencement will not have the condition added to their licence at such time, however the condition will be added if they are subsequently recalled and re-released;
- is serving a sentence of imprisonment for a determinate term of 12 months or more where that sentence is subject to release pursuant to section 244 of the Criminal Justice Act 2003 ("the 2003 Act"). This limits the sentence to only standard determinate sentences of 12 months or more imposed on adult offenders. The following sentences are therefore excluded: youth sentences, those serving sentences of less than 12 months or indeterminate sentences, extended sentences or sentences for offenders of particular concern; and offenders serving sentences for certain terrorist and terrorist connected offences;
- that sentence must be imposed in respect of one of the offences specified in Schedule 2 to the instrument, namely:
    - theft (under section 1 of the Theft Act 1968) but only where the offending concerns: theft from the person of another; theft from a vehicle or motor vehicle; or theft of a motor vehicle (but not including the offence of aggravated vehicle taking under section 12A of that Act);
    - robbery, burglary or aggravated burglary (under sections 8, 9 and 10 of that Act respectively);
- where the person is serving two or more sentences of imprisonment, the sentence that meets the above criteria must be the longest being served;
- who from any release, will be on licence for a period of 30 days or more, meaning those with less than 30 days left on their licence on release (which may be initial release or release after recall) will not have the condition included on their licence;

- who, on release, will reside at an address which is within a 'specified area', being one of the following police areas as specified in Schedule 1 to the instrument: Avon and Somerset, Cheshire, Gloucestershire, Gwent, Humberside and West Midlands;
- who has not previously had an electronic monitoring condition included on a licence in respect of the same sentence in accordance with the Order for the specified period. This means that any person released after recall who otherwise meets the criteria will not have the condition included if, prior to their return to custody, the condition had been included on their licence (or licences if released more than once) for the duration of the specified period, i.e. they have reached the maximum tagging period for their sentence length;
- who, to the satisfaction of the Secretary of State, is not otherwise unsuitable for electronic monitoring.

6.5 The 'specified period' is described in Article 4. This sets out when the condition must be imposed and for how long it should be imposed. The period commences on the date of the qualifying offender's 'first' release. Depending on their circumstances on commencement that may be the date of: (i) their automatic release (pursuant to section 244 of the 2003 Act), (ii) early release under the Home Detention Curfew (HDC) arrangements (pursuant to section 246 of the 2003 Act) or (iii) their re-release following recall (pursuant to section 255B, 255C or 256A of the 2003 Act). The period continues until the earlier of: (i) the point where any of the criteria described in Article 2 relating to a qualifying offender is not met, (ii) the end of their sentence, or (iii) 12 months from their first release, excluding any period where the qualifying offender is no longer released on licence (meaning the calculation of this 12 month period will 'pause' following a revocation of their licence).

6.6 This instrument is made in pursuit of a legitimate aim, namely, to ensure the compliance of the qualifying offender with their other licence conditions and to prevent re-offending during that part of their sentence which they serve in the community; and/or the prevention or detection of crime. The mandatory electronic monitoring and tracking of a person's whereabouts imposed under this instrument is considered necessary in a democratic society and the scope of offenders subject to the condition and the duration for whom it will be included on their licence is considered a proportionate means of achieving those aims.

6.7 The persons responsible for electronic monitoring, required pursuant to section 62(2B) of the 2000 Act, will be those set out in the Electronic Monitoring (Responsible Persons) Order 2018 (SI 2018/212). We do not anticipate the need to add a new provider to that list of responsible persons but we will bring forth further legislation in accordance with the 2000 Act if the need arises.

7. Policy background

What is being done and why?

Background and justification

7.1 This instrument is concerned with a group of offenders who offend prolifically for so called 'acquisitive crime', that is offences such as theft, burglary and robbery. Acquisitive criminals have the highest levels of reoffending across all offence types. The most recent figures show that 29% of those convicted of robbery and 51% of

those convicted of theft (including burglary) reoffend within a year of release, compared to 23% in all other cases[1].

7.2 Acquisitive crime also has low detection rates: 62% of robbery cases and 79% of theft (including burglary) cases resulted in no suspect being identified, compared with 24% in all other cases [2].

7.3 These high reoffending but low detection rates add to the overall cost of reoffending and may contribute to a lack of public confidence in the criminal justice system.

7.4 This legislation seeks to address this by providing a means for testing and understanding the benefits of the, relatively new, satellite enabled (GPS) electronic location monitoring functionality known as 'trail monitoring' on acquisitive offenders during their release on licence.

7.5 This legislation is being limited to allow for a test of policy and to understand more about the effectiveness of EM. The project is being evaluated and the findings will be published (see 7.10 to 7.12), this approach is in line with the justifications for the power when it was introduced by the Criminal Justice and Courts Act 2015.

7.6 Electronic monitoring has long been used as a tool in the criminal justice system. Home Detention Curfew, where offenders are released early from prison subject to an electronically monitored curfew, has been running since 1999. Electronic monitoring of curfew for community orders, suspended sentence orders and court bail is also long established.

7.7 Developments in technology have meant that more recently we have introduced GPS monitoring to provide assurance of compliance with exclusion / inclusion zones and for trail monitoring, which is where a subject's movements are tracked and recorded. For the purposes of this legislation, trail monitoring is not being used to assure compliance with restrictions around movements, such as exclusion zones or a curfew, which means that the offender is free to move where they like and when they like, subject to their other licence conditions. However, the data collected from trail monitoring provides information that shows the offender's movements, and from this the location, route, direction of travel, approximate speed, likely mode of travel, and time spent at a particular location can be deduced.

7.8 This data will be made available to the probation officer supervising the offender on a regular basis to better inform management and supervision. The increased use of this technology and the data it generates may be used to support the police in the investigation and detection of acquisitive offences. The police will be able to request previously unavailable data that could help to rule suspects in and out of investigations, potentially increasing the conviction rate for acquisitive crimes.

7.9 To date, electronic monitoring has been included on the licence of individual offenders on a discretionary, case-by-case basis. This instrument makes it compulsory for an electronic monitoring condition to be included on the licence of all those offenders who meet the qualifying criteria for the period described in paragraph 6. This is a targeted and justified approach for the following reasons:

[1] MOJ (2020). Proven Reoffending Statistics: October to December 2018, https://www.gov.uk/government/statistics/proven-reoffending-statistics-october-to-december-2018
[2] HO (2020). Crime Outcomes in England and Wales, year ending June 2020, https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-year-to-june-2020-data-tables

- the sentence length and the offence type in scope has a high rate of reoffending and a low rate of detection; it is expected that mandatory electronic monitoring may have a deterrent effect on offenders who have committed this type of acquisitive neighbourhood crime;
- the maximum duration the condition will remain on the licence whilst the offender is in the community is 12 months; this reflects research indicating that the propensity for reoffending for the offences in scope is highest immediately following release from custody with risk continuing and gradually diminishing to a low constant level of risk over 9-12 months;
- the condition will only be included on the licences of those offenders residing in six police areas initially, these are the 'pathfinder forces'. It is our intention to increase the police areas in scope in due course, with the equivalent untagged offenders in the remaining police areas in England and Wales acting as a control group. This will enable a robust evaluation to analyse the impact on reoffending and police investigations, test the anticipated deterrent effect of the condition against actual behaviour, and carry out a cost-benefit analysis. The evaluation will be published and will inform recommendations around continuation and expansion. Further details about the objectives of the evaluation are set out in paragraphs 7.10 to 7.12;
- the instrument provides that some exceptions may be made, in so far as the Secretary of State is to be satisfied that an offender is not otherwise unsuitable for electronic monitoring.

Evaluation

7.10 We recognise that there is more to learn about how to make the most effective use of electronic monitoring and this instrument will contribute to that; the focus on trail monitoring will be particularly valuable. The effect of the measure will be evaluated with a focus on understanding its impacts on:

- **Reoffending behaviour** – the extent to which trail monitoring on licence for offenders who commit neighbourhood acquisitive crimes impact on reoffending behaviour;
- **Efficient implementation** – how the measure has affected offenders, organisations, and communities; how the data sharing with the police has supported detection of crime and arrest.
- **Cost effectiveness** – what the costs and benefits of the intervention for the criminal justice system are, specifically for the police, electronic monitoring, probation and prison services.

7.11 The evaluation will be based on the first 1,500 offenders who have been subject to the licence condition and, in order to include proven reoffending outcomes, it will be available around two years from commencement, depending on when this number is reached.

7.12 Throughout the evaluation period, management information will be collected to inform effective operational delivery, expansion to further police areas and the qualitative evaluation of practice and processes used.

Data protection

7.13 Data collected as a result of the compulsory electronic monitoring condition will be processed in compliance with data protection legislation and the statutory Code of Practice for Electronic Monitoring. Qualifying offenders will be made aware of the specific use to which their data will be put. A Data Protection Impact Assessment has been undertaken for this project.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 No consultation has been undertaken in connection with this statutory instrument.

11. Guidance

11.1 Operational guidance and training will be provided to HMPPS, Community Rehabilitation Companies and the police regarding the implementation of this instrument.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is continuous collection and analysis of management information from the outset; we will identify the profiles of individuals who are being monitored and their short-term outcomes including recalls to prison. In addition, we will conduct a qualitative (process) and quantitative (impact) evaluation of the first 1,500 offenders who have been subject to this measure which will be published.

14.2 The regulation does not include a statutory review clause.

15. Contact

15.1 Robyn Malan de Merindol at the Ministry of Justice Telephone: 07970 306442 or email: robyn.malandemerindol1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Amy Randall, Deputy Director for Bail, Sentencing and Release Policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kit Malthouse MP, Minister of State at the Ministry of Justice and Home Office can confirm that this Explanatory Memorandum meets the required standard.